No. 886546

Supreme Court, U.S.
FILED
OCT 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALBERT DURO,

Petitioner,

versus

EDWARD REINA, CHIEF OF POLICE, SALT RIVER DEPARTMENT OF PUBLIC SAFETY, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY; AND THE HON. RELMAN R. MANUEL, SR., CHIEF JUDGE OF THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY COURT,

Respondents.

ON THE WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT

RICHARD B. WILKS
M. J. MIRKIN
Counsel of Record
SHEA & WILKS
Attorneys for Respondents
114 W. Adams, Suite 200
Phoenix, Arizona 85003
(602) 257-1126

BEST AVAILABLE COPY

49pp

QUESTIONS PRESENTED

1. Does the fact that Albert Duro, an enrolled member of the Torrez-Martinez band of Mission Indians (Cahuilla) who worked and lived on the Salt River Pima-Maricopa Indian Community, is not an enrolled member of the Salt River Pima-Maricopa Indian Community deprive the Salt River Pima-Maricopa Indian Community of misdemeanor criminal jurisdiction over him?

2. Should well established "equal protection" rules concerning enrolled Indians be overruled by now characterizing status obtained by enrollment as the equivalent of inherent racial characteristics?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTION AND STATUTORY PROVISIONS

LEGAL PERIODICALS, TEXT BOOKS, LEGISLATIVE HISTORY AND OTHER REFERENCE BOOKS

No. 886546

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALBERT DURO,

Petitioner,

versus

EDWARD REINA, CHIEF OF POLICE, SALT RIVER DEPARTMENT OF PUBLIC SAFETY, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY; AND THE HON. RELMAN R. MANUEL, SR., CHIEF JUDGE OF THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY COURT,

Respondents.

ON THE WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT

RICHARD B. WILKS
M. J. MIRKIN
Counsel of Record
SHEA & WILKS
Attorneys for Respondents
114 W. Adams, Suite 200
Phoenix, Arizona 85003
(602) 257-1126

STATEMENT OF THE CASE

In 1984, Albert Duro was taken into custody of the Community Department of Public Safety and charged with the unlawful discharge of firearms within the boundaries of the Salt River Pima-Maricopa Indian ("Community"). The offense is a misdemeanor. In fact, the misdemeanor "unlawful discharge" was a shooting alleged to have caused the death of Philip Brown, a fourteen year old youth.

Duro then sought habeas corpus from the U.S. District Court on the basis that the Community had no jurisdiction over him solely because, although an Indian, he was not enrolled in the Community. The district court granted habeas corpus. Duro was released and disappeared. The Court of Appeals for the Ninth Circuit reversed. *Duro v. Reina,* 821 Fed. 1358 (9th Cir. 1987). Thereafter it amended its opinion. *Duro v. Reina,* 851 F.2d 1136 (9th Cir. 1988). It denied a rehearing and an *en banc* rehearing. *Duro v. Reina,* 860 F.2d 1463 (9th Cir. 1988). Duro remains at large not having surrendered himself to the Community Department of Public Safety.

STATEMENT OF FACTS

The Salt River Pima-Maricopa Indian Community, a federally recognized self-governing Indian Community under the Indian Reorganization Act of 1934, occupies a reservation in south central Arizona within the Phoenix metropolitan area which was established by the executive order of President Rutherford B. Hayes in 1879. (Joint App. Exhibit B at 20-21). The population of the Community consists of its enrolled members and other Indian people associated in the Community with them. (Joint App. Stipulation of Fact No. 4 at 61-66). In March of 1984 the Petitioner, Albert Duro, moved into the Community to live with a member of the Community at her family home. He resided in the Community until approximately June 15, 1984. (*Id.* No. 13 at 62) He was employed by Picopa Construction Company, a company

owned by the Community, from February 1, 1984 until approximately June 15, 1984. (*Id.* No. 14 at 62-63). On June 3, 1984 Albert Duro was arrested on alcohol and marijuana possession charges under the Community Code of Ordinances by the Community police department. (*Id.* No 6. at 61). He entered a plea of guilty before the Community Court, was found guilty and sentenced to pay a fine. *(Id).* On June 19, 1984 he was arrested under a federal indictment in California by federal agents and charged with the murder of a resident of the Community — a fourteen year old boy who was a member of the Gila River Indian Community. (*Id.* No. 7 at 61). The indictment was dismissed without prejudice in September of 1984. (*Id.* No. 8 at 61) and soon thereafter Albert Duro was placed in the custody of the Salt River Community Police Department. (*Id.* No. 9 at 61). A criminal complaint had been filed against him charging him with violation of the Criminal Code of the Community in the use and discharge of a firearm, based on the same incident which was the subject of the dismissed indictment. (*Id.* No. 10 at 62). Albert Duro is an enrolled member of the Torrez-Martinez (Cahuilla) Band of Mission Indians, a federally recognized band of American Indians. (*Id.* No. 2 at 60). The criminal jurisdiction asserted by the Community through its Code of Ordinances is over any person otherwise subject to the jurisdiction of the Salt River Court. Salt River Community Code § 4-1(c) (1984). (Joint App. Exhibit K at 43). The petitioner is subject to the criminal jurisdiction of the Salt River Court as a member of a federally recognized Indian tribe whose association with the Salt River Pima Maricopa Indian Community encompasses significant elements of his life; where he worked, where he lived, and with whom he lived. Unfortunately, his relationship with the Community involved as well the death of another resident of the Community.

SUMMARY OF ARGUMENT

In *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191 (1978), the Court held that Indian tribes do not have the inherent jurisdiction to try and to punish non-Indians. The

holding was supported by an examination of the history of treaty relationships between the United States and Indian tribes, the pattern of federal jurisdictional legislation in regard to Indian country and decisions of the Court from the earliest days of the Republic which compelled the conclusion not only that Indian tribes had no inherent jurisdiction to try and to punish non-Indian offenders against their laws, but as to Indian offenders within Indian reservations "it is intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs." *United States* v. *Rogers,* 4 How. 567, 571 (1846). Statutes enacted by the Congress take into federal jurisdiction some categories of crime committed by Indians within Indian country and explicitly leave to Indian tribes the jurisdiction of crimes between Indians. Except as federal legislation allows, and tribes consent, states have no criminal jurisdiction over crimes committed by Indians on Indian reservations.

No case decided by the court subsequent to *Oliphant* extends or modifies the holding in *Oliphant* so as to deny tribal jurisdiction over crimes committed by Indians in Indian country. Three post *Oliphant* decisions, *Rice* v. *Rehner,* 463 U.S. 713 (1983), *National Farmers Union Insurance Company* v. *Crow Tribes of Indians,* 471 U.S. 845 (1985) and *Brendale* v. *Confederated Yakima Nation,* ____ U.S. ____, 106 L.Ed.2nd 343 (1989) set standards in regard to tribal jurisdiction generally that support respondents' position that unless the Congress has withdrawn tribal jurisdiction, a tribe has an interest under federal law to exercise its power of governance to prevent adverse impacts which are serious and can imperil the political integrity of the tribe. The protection of the lives and property of those who live within the tribal reservation, the prevention of criminality, is essential to the political integrity of Indian tribes and is a power which clearly preexisted American sovereignty and which has not been diminished by it.

Indian tribes have from time immemorial governed themselves and those who associated with them regardless of whether they were members of the tribe. The court has recognized in a series of cases stretching over one hundred and thirty years that it is the policy of Congress to leave to Indian tribes criminal jurisdiction of all controversies between Indians without distinction as to membership. The executive branch has consistently recognized that tribes have criminal jurisdiction over offenses committed by Indians on tribal reservations without distinction as to tribal membership. The Attorney General in 1883 recognized this principle and the Solicitor of the Department of Interior in a series of opinions in the 1930's and 1940 specifically ruled that tribes could exercise criminal jurisdiction over non-member Indians for offenses committed on the reservation. Felix Cohen in his monumental *Handbook of Federal Indian Law* (1942) found well settled the proposition that except where the federal government has taken jurisdiction "all offenses other than those remain subject to tribal law and custom and to tribal courts." The federal government has taken jurisdiction of certain major crimes and of crimes defined by federal law and assimilated into federal law from state enactments except offenses by one Indian against another Indian, offenses for which an Indian offender has been tried by the tribe and offenses over which by treaty the tribe has exclusive jurisdiction.

The effect of the decision below is to maintain a pattern of jurisdiction that has existed since before the imposition of American sovereignty. Upsetting this settled pattern of criminal jurisdiction would result in a jurisdictional void so that no government would have the authority to try and to punish such offenders and Indian people on Indian reservations would be subject to petty offenses and misdemeanors committed by persons beyond the reach of the law.

There is no Indian Civil Rights Act equal protection violation. The court has determined that treatment of

Indians in a way different from treatment of non-Indians does not amount to improper discrimination since the differing treatment is based on the special status of Indian people under the laws of the United States. Non-member Indians are and ought to be subject to the laws of the tribal reservations whose ordinances they have violated. Albert Duro should not have special status as against other Indian people who happen to be members of the Salt River Pima-Maricopa Indian Community. Albert Duro's status as an American Indian is based on his membership in a federally recognized Indian tribe. He may end that status and avoid the criminal jurisdiction of Indian tribes by removing himself from the membership rolls of his tribe.

ARGUMENT

I. THE *OLIPHANT* DECISION DETERMINED THAT NON-INDIANS WERE EXEMPT FROM TRIBAL COURT CRIMINAL JURISDICTION AND THE AUTHORITIES CITED BY THE COURT RECOGNIZED TRIBAL COURT CRIMINAL JURISDICTION OVER INDIANS WITHOUT DISTINCTION.

During the hundred years following the adoption of the Constitution, federal authority over Indian tribes, through conquest, treaties, or passive occupation changed the nature of the sovereign power of Indian tribes excluding from that authority "those powers 'inconsistent with their status.'" *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191, 208, (1978). For that reason this Court held in *Oliphant* that, "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians". *Id.* at 212.

In *Oliphant,* this Court observed that it was the assumption of all that tribes had no criminal jurisdiction over non-Indians. *Id.* at 206. Treaties were entered into with Indian tribes which contained provisions to protect them against incursions by non-Indians. The effort after all was to promote peace between the Indian tribes and surrounding non-Indian communities. Depredation by non-Indian criminal elements could cause retaliation by the tribes. A typical treaty provision would guarantee "that any citizen of the United States, who shall do an injury to any Indian of the nation, or to any other Indian or Indians residing in their towns, and under their protection, shall be punished according to the laws of the United States." *Id.* at 197, 198 n. 8. The lack of jurisdiction in Indian courts or among Indian authorities to try and punish non-Indian offenders carried with it the concomitant obligation on the United States to try and punish non-Indian offenders against the peace and tranquility of Indian country, and left undisturbed the tribe's inherent jurisdiction to try and punish Indian offenders. As was noted in *Oliphant,* Judge Isaac C. Parker "held that to

give an Indian tribal court 'jurisdiction of the person of an offender, such offender must be an Indian'." *Id.* at 200 citing *Ex Parte Kenyon,* 14 F. Cas. 353 (No. 7, 720) (WD Ark. 1878).

Beginning in 1790 the Congress constructed a statutory framework of criminal jurisdiction in Indian country which has been refined over the years. The federal legislative scheme in regard to criminal jurisdiction in Indian country on the one hand asserts jurisdiction in federal court over certain major crimes committed in Indian country by Indians and on the other hand creates federal crimes out of state criminal enactments and extends federal crimes to Indian country when the crimes are committed by a non-Indian against an Indian or by an Indian against a non-Indian.[1] The assertion of jurisdiction in the Major Crimes Act does not exclude the jurisdiction of tribal courts over a crime defined by the tribal code arising out of the same transaction as the federal criminal proceedings. *United States* v. *Wheeler,* 435 U.S. 313 (1978). Crimes by non-Indians against non-Indians in Indian country have been held to be within the exclusive jurisdiction of state courts. *United States* v. *McBratney, 104 U.S. 621 (1882). In State of Arizona* v. *Flint,* 157 Ariz. 227, 756 P.2d 324 (1988) (cert. den. June 26, 1989), the prosecution claimed state courts had concurrent jurisdiction with the federal courts over a crime committed by a non-Indian against an Indian in Indian country. The Arizona Court of Appeals noted that this Court in *United States* v. *John,* 437 U.S. 634, 651 (1978) held that the federal court jurisdiction under 18 U.S.C. § 1153 (the Major Crimes Act) is preemptive of state jurisdiction and held that the state had no jurisdiction over the offense. "If concurrent state jurisdiction does not exist under 18 U.S.C. § 1153, it seems likely that a similar result should obtain under 18 U.S.C. § 1152." *State of Arizona* v. *Flint,* 157 Ariz. at 231, 756 P.2d at 328.

The Indian Civil Rights Act of 1968, and its amendments, restrict the exercise of criminal jurisdiction by Indian tribal courts.[2] The Indian Reorganization Act of 1934 authorizes Indian tribes to enact constitutions subject to approval by the Secretary of the Interior which may contain within them authorizations for legislative bodies to create courts and define criminal offenses. Title 25 U.S.C. § 467. Beyond these Acts, the Congress has imposed no limitation upon the exercise of tribal court jurisdiction over Indians. Those offenses committed by Indians against the person or property of Indians not exclusively under federal jurisdiction are within the jurisdiction of Indian tribal courts.[3] The states, of course, have no jurisdiction over crimes committed by Indians in

1 The Federal Major Crimes Act, 18 U.S.C. § 1153, first enacted as the Act of March 3, 1885, Ch. 341, 59, 23 Stat 362, 385, makes certain enumerated offenses committed by Indians in Indian country crimes within the exclusive jurisdiction of the United States.

The Indian Country Crimes Act, 18 U.S.C. § 1152, makes all federal criminal laws applicable to Indian Country, except "offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.". (The Indian against Indian exception existed in the predecessors of the Act since the Act of March 3, 1817, Ch. 92, 3 Stat. 383 §§ 1, 2.) The Assimilative Crimes Act, 18 U.S.C. § 13, originally acted as the Act of March 8, 1825, ch. 65 4 Stat. 115, Sec. 3, assimilates state laws into 18 U.S.C. § 1152 so as to make violation of them federal offenses. The Indian against Indian exception applies to 18 U.S.C. § 13 offenses. *Acuna* v. *United States,* 404 F.2d 140, 142 (1968). *See also Williams* v. *Lee,* 358 U.S. 217, 220 (1959) N. 5. "For example, Congress has granted to the federal courts exclusive jurisdiction upon Indian reservations over 11 major crimes. And non-Indians committing crimes against Indians are now generally tried in federal courts."

2 25 U.S.C. § 1301 - 1303 provide for habeas corpus relief in the District Courts for violation by a tribe of any of the enumerated rights.

3 "Except for the offenses enumerated in the Major Crimes Act, all crimes committed by enrolled Indians against other Indians within Indian country are subject to the jurisdiction of tribal courts." *United States v.* Antelope, 430 U.S. 641, 643 n.2 (1975).

Indian country.[4] Nor can such jurisdiction by assumed by Arizona or any other state without the consent of the United States. 25 U.S.C. § 1321(a) gives such consent subject to the "consent of the Indian tribe occupying the particular Indian country... which could be affected...". Additionally, such states would have to affirmatively remove any impediments created by an Enabling Act. Title 25 U.S.C. § 1324. This Court has noted: "Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation... Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester* v. *Georgia* had denied."

4 Those courts which have spoken have uniformly determined that states do not have criminal jurisdiction over Indians who commit crimes in Indian Country. "[S]tate courts...do not have jurisdiction of an offense committed by a tribal Indian in 'Indian Country'". *Application of Denetclaw,* 83 Ariz. 299, 303, 320 P.2d 697, 701 (1958). The State of Wisconsin has "no jurisdiction of crimes committed by tribal Indians, on Indian reservations." *Konaha* v. *Brown,* 131 F.2d 737, 738 (7th Cir. 1942). In the absence of specific congressional grant of authority the state has no jurisdiction over crimes by Indians within Indian country. *People* v. *Luna,* 683 P.2d 362, 364 (Colo. App 1984). In the absence of congressional authorization for states to have jurisdiction over crimes by Indians in Indian country it is "the intention of Congress to leave the punishment of crimes not mentioned in the Act of 1885, or in other enactments peculiarly made applicable to Indians, to the tribes themselves." *State* v. *Rufus,* 205 Wisc. 317, 237 N.W. 67 (1931). *See* also *United States* v. *Kagama,* 118 U.S. 375 (1986); *Langley* v. *Ryder,* 778 F.2d 1092 (5th Cir. 1985); *Youngbear* v. *Brewer,* 549 F.2d 74 (8th Cir. 1977); *State* v. *Burnett,* 671 P.2d 1165 (Okl. Cr. 1983); *State* v. *Allan,* 100 Idaho 918, 607 P.2d 426 (1980); *State* v. *Smith,* 277 Or. 251, 560 P.2d 1066 (1977); *State* v. *Winckler,* 260 N.W.2d 356 (S.D. 1977); *White* v. *Schnecklan,* 56 Wash. 2d 173, 351 P.2d 919 (1960); *Application of De Marrias,* 77 S.D. 294, 91 N.W. 2d 480 (1958); *State* v. *Campbell,* 53 Minn. 354, 55 N.W. 553 (Minn. 1893).

Williams v. *Lee,* 358 U.S. 217, 220 (1959)[5]

In *Oliphant* the Court referred to its discussion of Congressional Indian criminal jurisdiction policy in *In re: Mayfield,* 141 U.S. 107 (1891), noting that,

> The 'general object' of the Congressional statutes was to allow Indian nations criminal 'jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side'.

Oliphant, 435 U.S. at 204.

Oliphant quoted at length from a 1960 Senate committee report done in consideration of a proposed statute that would prohibit unauthorized entry upon Indian land for the purpose of hunting or fishing: "One who comes on such lands without permission may be prosecuted under state law but a non-Indian trespasser on an Indian reservation enjoys immunity. *This is by reason of the fact that Indian tribal law is enforceable against Indians only; not against non-Indians'.*" (emphasis in original) *Id.* at 205.

5 *See also, e.g., United States* v. *Sutton,* 215 U.S. 291, 295, 296 (1909) (Washington); *United States* v. *Sandoval,* 231 U.S. 28, 36-38, 40 (1913) (New Mexico); *United States* v. *Chavez,* 290 U.S. 357, 360, 365 (1933) (New Mexico); *Williams* v. *United States,* 327 U.S. 711, 714, 715 n.10 (1946) (Arizona); *Warren Trading Post* v. *Arizona State Tax Commission,* 380 U.S. 685, 687 n.3 (1965) (Arizona); *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 149 (1973) (New Mexico) and; *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164, 178 (1973) (Arizona) where the Court noted "a startling aspect of this case is that appellee apparently concedes that, in the absence of compliance with 25 U.S.C. § 1322(a), the Arizona courts can exercise neither civil nor criminal jurisdiction over reservation Indians." and "in light of our prior cases, appellee has no choice but to make this concession. *See, e.g., Kennerly* v. *District Court,* 400 U.S. 423 (1971); *United States* v. *Kagama,* 118 U.S. 375 (1886)." McClanahan, 411 U.S. at 178 n.19.

Oliphant cited *United States* v. *Rogers,* 45 U.S. (4 How.) 567 (1846) for a description of the dependent sovereignty of Indian tribes in relationship to the United States. *Id.* at 209. *Rogers* dealt with the question of whether a non-Indian could by adoption into the tribe become an Indian and benefit from the Indian against Indian exception to the Indian Country Crimes Act. After determining that a person entitled to the exception must be ethnically an Indian, the Chief Justice noted what must have been the common assumption and understanding of the time: "[A]nd it is intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs." *United States* v. *Rogers,* 4 How. at 571.

Nor can it be understood from Mr. Justice Johnson's concurrence in *Fletcher* v. *Peck,* 10 U.S. (6 Cranch) 87 (1810) that he meant anything but "Indians" when he used the word "themselves" in the passage noted in *Oliphant:* "[T]he restrictions upon the right of soil in the Indians, amount...to an exclusion of all competitors (to the United States) from their markets; and the limitation upon their sovereignty amounts *to the right of governing every person within their limits except themselves."* (emphasis in original) *Oliphant,* 435 U.S. at 209.

Oliphant reviewed the Court's discussion in *Ex P..rte Crow Dog,* 109 U.S. 556 (1883), of whether, prior to the enactment of the Major Crimes Act, "federal courts had jurisdiction to try Indians who had offended against fellow Indians on reservation land." *Oliphant,* 435 U.S. at 210. *Crow Dog* determined that without Congressional enactment federal courts had no such jurisdiction. *Crow Dog* stands clearly for the proposition that without Congressional enactment jurisdiction of criminal offenses between Indians is "left to be dealt with by each tribe for itself, according to its local customs." *Ex parte Crow Dog,* 109 U.S. at 572.

The local law of the tribe exception to the Indian Country Crimes Act (18 U.S.C. § 1152) exemplifies the

policy of the United States that offenses by Indians in Indian country are left to tribal adjudication unless, as in the Major Crimes Act, Congress has asserted federal jurisdiction or the tribal authority does not exercise such jurisdiction.[6] Indians who are subject to the Major Crimes Act "shall belong to (the reservation where the offense occured) or some other tribe...its effect is confined to the acts of an Indian of *some* tribe, of a criminal character, committed within the limits of the reservation". *United States* v. *Kagama,* 119 U.S. 375, 383 (1886). (Emphasis supplied)[7]

While *Oliphant* stands for the proposition that "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians", (*Id.* at 212) this Court's analysis supports as well the proposition that Indian tribes have the jurisdiction to try and to punish persons who are members of federally recognized Indian tribes and whose involvement with the tribal community signifies they are a part of that community. Albert Duro fits that test. Indeed, he fits it comfortably.

6 18 U.S.C. § 1152 provides "This section shall not extend...to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe..."

7 This court's observation in *Kagama* was made in the course of upholding the validity of the Major Crimes Act.

In no case subsequent to *Oliphant* did this court modify or extend its holding in *Oliphant*.[8]

II. THIS COURT'S HOLDINGS IN POST *OLIPHANT* CASES SUPPORT THE PRINCIPLES OF INHERENT SOVEREIGNTY UPON WHICH RESPONDENT'S POSITION IS BASED.

In *Rice* v. *Rehner, National Farmers Union Insurance Companies* v. *Crow Tribe of Indians,* and *Brendale* v. *Confederated Yakima Nation,* this Court dealt with the questions of a state's right to regulate on-reservation liquor sales, of the effect of the *Oliphant* reasoning on a tribe's jurisdiction over civil claims by an Indian against a non-Indian entity and of the right of an Indian tribe to impose zoning regulations on fee land within an Indian reservation. *Rice* held that the state had the right to regulate the sale of liquor on an Indian reservation:

8 The Court's notation in *United States* v. *Wheeler,* 435 U.S. 313, 326 (1978) that "they [Indian tribes] cannot try non-members in tribal courts. (citing *Oliphant*)..." was part of the characterization of tribal jurisdictional attributes. As in *Washington* v. *Confederated Tribes of the Colville Reservation,* 447 U.S. 134 (1979); *Montana* v. *United States,* 450 U.S. 544 (1980); and in *Merrion* v. *Jicarilla Apache Tribe,* 455 U.S. 130 (1982) the characterization of the holding in *Oliphant* had no bearing at all on the decision of the court. In *Wheeler* nothing in the analysis would have required a different result if Wheeler had been a member of a tribe other than the Navajo. The Navajo tribe still would have had the right to exercise its inherent criminal jurisdiction over Indians separate from the exercise of the criminal jurisdiction of the United States. In *Colville* the question was not whether tribal jurisdiction is ousted by the state's imposition of its sales tax on non-member Indians within the tribal reservation, but whether that state authority existed side by side with tribal authority.

In *Montana* the question was not whether tribal law could be enforced on non-member Inidans within the tribal reservation but whether tribal regulations could be enforced on the activities of non-Indians on fee land not owned by the tribe. *Montana,* 450 U.S. at 560 n.9. In *Merrion* there was no question raised of tribal criminal jurisdiction over non-Indians or non-members. In *National Farmers Union,* 471 U.S. at 853 and *Brendale,* 106 L.Ed. at 360, the Court noted that *Oliphant* stood for the proposition that tribal courts did not have criminal jurisdiction to try and to punish non-Indians for offenses committed on the reservation.

> Because we find that there is no tradition of sovereign immunity that favors the Indians in this respect, and because we must consider that the activity in which Rehner seeks to engage potentially has a substantial impact beyond the reservation, we may accord little if any weight to any asserted interest in tribal sovereignty in this case.

Rice, 463, U.S. at 725.

So that where there is a tradition of sovereign immunity that favors the Indians and where there is no substantial impact beyond the reservation, the assertion of tribal sovereignty ought to be respected. Indeed, where as here, a crime is committed by an Indian against an Indian on a reservation, the assertion of tribal sovereignty to try the offender, and to punish him, if convicted, ought to be recognized. Especially is this so where as here, there is a strong tradition of tribal criminal jurisdiction over non-member Indians.

National Farmers Union determined that the *Oliphant* reasoning did not apply to the issue of civil jurisdiction over non-Indians:

> Congress' decision to extend the criminal jurisdiction of the federal courts to offenses committed by non-Indians against Indians within Indian country supported the holding in *Oliphant,* there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation.[9]

National Farmers Union 471 U.S. at 854.

9 *See Oliphant,* 435 U.S. at 204: "While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions."

The federal legislative scheme of criminal jurisdiction in Indian country specifically excludes crimes by an Indian against the person or property of another Indian except as to the specific offenses in the Major Crimes Act. As in *National Farmers Union,* there is here "no comparable legislation granting the federal courts jurisdiction..." over a criminal transaction not enumerated in 25 U.S.C. § 1153 in which the only participants are Indians and which occurs on an Indian reservation.

In *Brendale* this court reveiwed the standard for determining whether an Indian tribe had jurisdiction to impose its zoning regulations on fee land within the reservation. Although addressed to the issue of regulation of such fee lands, the standards enunciated by the plurality in this Court form at least the outer limits of protection of the integrity of Indian tribes:

> *[T]he tribe has an interest under federal law, defined in terms of the impact of the challenged uses on the political integrity, economic security, or the health and welfare of the tribe.* But,... that interest does not entitle the tribe to complain or obtain relief against every use of fee land that has some adverse effect on the tribe. *The impact must be demonstrably serious and must imperil the political integrity, economic security or the health and welfare of the tribe.* (Emphasis supplied)

Brendale, 106 L.Ed.2d at 363. The Court then acknowledges that "the tribe's protectable interest is one arising under federal law..." *Id.* at 363.

The *Brendale* standard in the *Duro* context is a

threshold standard.[10] It cannot be applied individually in each criminal case arising in Indian country. Whether that burglary or that assault or that illegal and dangerous discharge of a firearm ought to be tried in tribal court because the particular offense imperiled the "political integrity, economic security or the health and welfare of the tribe." Rather, the inability of tribal courts to try and to punish non-member Indian offenders in and of itself would create an impact that is demonstrably serious and one which must certainly imperil the political integrity, economic security and the health and welfare of Indian tribes.[11]

The post *Oliphant* cases set standards under which it is evident that tribal jurisdiction over non-member Indians was not divested by the accession of American sovereignty. Such jurisdiction is not inconsistent with contemporary tribal status.

III. INDIAN TRIBES TRADITIONALLY AND IN MODERN TIMES HAVE RETAINED JURISDICTION TO TRY AND TO PUNISH NON-MEMBER INDIANS.

10 The *Brendale* standard follows from this court's previous observation in *Merrion* v. *Jicarilla Apache Tribe,* 455 U.S. 130, 171 (1982):

> In sharp contrast to the tribes' broad powers over their own members, tribal powers over non-members have always been narrowly confined. The Court has emphasized that "exercise of tribal power beyond *what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana* v. *United States,* 450 U.S. 544, 564. (Emphasis supplied)

See also *Williams* v. *Lee,* 358 U.S. at 223: "The cases in this Court have consisently guarded the authority of Indian governments over their reservations".

11 The practical impact of law enforcement in the wake of *Greywater* v. *Joshua,* 846 F.2d 486 (8th Cir. 1988) is discussed by Pommersheim *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction,* 31 Arizona L.R. 329, 360 (1989)

(a) Prior to American Sovereignty Indian Tribes Exercised Criminal Jurisdiction Over Non-Member Indians

Communities which govern themselves, necessarily enforce the laws, rules and customs of the community upon all who come within the ambit of community life, or within the jurisdiction of the governing body.[12] It cannot be said that enforcement is limited to members of the community and non-members are therefore to be dealt with only by expulsion or if as an enemy of the community by harsher and different standards than those which are normally applied in criminal cases to community members. Most expecially is this so in situations where communities or tribes, or some members of them, live in close proximity or in the territory of the other, and as neighbors not tribal enemies. One of the most extensive studies of Indian tribal law of the time prior to European contact and Ameican sovereignty was written by the lawyer, Karl N. Llewellyn and the anthropologist, E. Adamson Hobel.[13] They observed that Cheyenne police regulations controlled the alien as well as the tribal member.[14] Indeed, the police control of the non-Cheyenne Indian was the

12 Although Mr. Duro has asserted that he is not to be considered an Indian for jurisdictional purposes and is subject only to federal and state criminal laws, (Pet. Brief at 38) he has not taken the step of removing himself from the rolls of the Torrez-Martinez Band of Indians (Cahuilla). To do that would end his juridical Indian status under the holding in *United States ex rel. Standing Bear* v. *Crook*, 25 F. Cas. 695 (No. 14,891) (C.C. Neb. 1879), and would also end the benefits that that status accords. Notwithstanding Duro's assertion that his tribe has no criminal jurisdiction over its members (Pet. Brief at 3), the tribe in which Mr. Duro is enrolled has the authority under federal law to enact criminal laws, enforce them, try offenders of them and punish such offenders. See Solicitor's opinion of November 14, 1978, *Criminal Jurisdiction: P.L. 280*, 6 I.L.R. H-1.

13 Llewellyn and Hoebel, *The Cheyenne Way, Conflict and Case Law in Primitive Jurisprudence* (1941).

14 *The Cheyenne Way*, at 238.

same as that imposed on a Cheyenne tribal member.[15] Indian tribes have not lived in isolation from one another. Tribal members traded with other tribes and, of course, tribes made alliances for defense. Listed among the traditional allies of the Maricopa are the Mission Indians (Cahuilla).[16] The Maricopas themselves sought and received refuge with the Pimas and settled in villages among them both on the Gila and Salt Rivers.[17]

(b) This Court has Always Recognized Tribal Jurisdiction Over Indians in General and not Members of a Particular Tribe.

For over 130 years this Court has spoken with a single voice on the question of the inherent jurisdiction of Indian tribes to try and to punish Indian offenders against tribal law. From *Rogers* in 1846 through *Crow Dog, Kagama* and *Mayfield* to *Antelope* in 1977, the policy of the Congress has been described by this Court as being one which has left to Indian tribal courts criminal jurisdiction of all controversies between Indians and which recognized that Indians, for this purpose, are not only "members of a tribe, but of the race generally — of the family of Indians; and it intended to leave them both, *as regarded their own tribe, and other tribes also,* to be governed by Indian usages and customs." (Emphasis Supplied) *Rogers*, 4

15 Two members of the Dakota Tribe, who had lived with the Cheyenne for some time violated a Cheyenne police regulation on the buffalo hunt and were punished as a Cheyenne tribal member would have been. It is related that the offenders were punished and then told "now you know what we do when anyone disobeys our orders...now you know we mean what we say." The punishment was followed by rehabilitation of the Dakota offenders as it would have been to Cheyennes. *The Cheyenne Way*, at 112-114.

16 Spier, *Yuman Tribes of the Gila River* at 42, 172 (1970).

17 Russell, *26th Annual Report of the Bureau of American Ethnology — 1904-05, The Pima Indians*, Government Printing Office, 1908, at 22.

How. at 573. The policy of Congress has not changed.[18] Congress has not amended the Indian Country Crimes Act to remove the Indian against Indian exception, or, indeed the pre-emption exception accorded to tribal courts in the punishment of an Indian who commits a crime against a non-Indian. 25 U.S.C. § 1152. Certainly, Congress has the plenary power under the Indian Commerce Clause to sweep all crimes by or against Indians in Indian Country into the federal juristictional net. U.S. Const. art. I § 8, cl. 3. It has refrained from doing this for over 200 years. And this Court has recognized this to be the policy of the United States. "Except for the offenses enumerated in the Major Crimes Act, all crimes committed by enrolled Indians against other Indians within Indian Country are subject to the jurisdiction of tribal courts." *Antelope,* 430 U.S. at 643 n. 2.

Congress has dealt with Indian people and Indian tribes in a variety of ways and as to each of those ways it has been specific. If the congress wished to limit tribal criminal juristiction to each tribe's members it could have done that (having modified the word "Indian" in some statutes by the word "member" and In other statutes by other words[19]). In fact the policy has remained the same and this

18 The Report of the House of Representatives in regard to the Trade and Intercourse Act of 1834 reveals the understanding of the House as to the Indian against Indian exception

> "It will be seen that we cannot, consistently with the provisions of some of our treaties, and of the territorial act, extend our criminal laws to offenses committed by or against Indians, *of which the tribes have exclusive jurisdiction;* and it is rather of courtesy than of right that we undertake to punish crimes committed in that territory by and against our own citizens." H.R. Rep. No. 474, 23rd Cont., 1st Sess., at page 13 (1834). (Emphasis supplied)

Petitioner is not detered by the plain language of the exception or the plain language of the House Report. "However, the exception to federal jurisdiction was not as it may first seem." (Pet. Brief at 28)

19 See Appendix A

Court has recognized its steadfastness over the years.[20]

(c) The Executive Has Recognized the Criminal Jurisdiction of Indian Tribes Over non-Member Indians

In an opinion that antedated *Crow Dog* by a few months, the Attorney General advised the Secretary of the Interior that the federal courts had no jurisdiction over the offense of murder "of one tribal Indian by another, their tribes being different, and the murder having been committed within the reservation of a third tribe..." 17 Op. Atty. Gen. 566 (1883).

The Attorney General opined: "If no demand for Foster's surrender shall be made by *one* or *other* of the tribes concerned, founded fairly upon a violation of some law of *one* or *other* of them having jurisdiction of the offense in question, it seems that nothing remains except to discharge him." 17 Op. Atty. Gen. 566,570 (1883) [Emphasis supplied].

In a series of opinions of the Solicitor of the Department of the Interior the question of tribal court criminal juristiction over non-member Indians was clearly resolved. In an opinion dated March 17, 1937, the Solicitor responded to the question of whether an ordinance adopted by the tribal council of the Confederated Salish and

20 Mr. Duro recognizes that the Trade and Intercourse Act excepted from its jurisdiction offenses committed by "one Indian against a person or property of another Indian" but then asserts that "the Act did not vest jurisdiction over intertribal offenses with the tribes." (Pet. Brief at 29) The learning of *Oliphant* is tribal powers are limited by their inconsistency with the predominant American sovereignty or by the removal of them by the Congress. It is not necessary for the Congress to vest in the tribes jurisdiction over non-member Indians when they already had that jurisdiction. *See Merrion* v. *Jicarilla Apache Tribe,* 455 U.S. 130, 137 (1982):

> The power to tax is an essential attribute of Indian sovereignty because it is a necessary insrument of self-government and territorial management...The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign...

Kootenai Tribes and which provided "...that the definition of the word 'Indian' for the purposes of the enforcement of the ordinances, would be 'any person of Indian descent who is a member of any recognized Indian tribe now under federal jurisdiction'..." was valid under federal law. The Solicitor determined that the definition in the ordinance was too broad because the tribal council's authority under its constitution was limited to enacting ordinances governing the conduct of members of the Confederated Tribes only. In an opinion dated March 17, 1937, the Solicitor suggested "that further consideration be given to the possibilities of enlarging jurisdiction limited by tribal constitution, as in the cases of this kind to members of the tribe where such enlargement may be desirable through constitutional amendment or possibly delegation of departmental authority." 1 Op. Sol. 736.

In his opinion dated October 25, 1938, the solicitor determined that the tribal court of the Rocky Boy's Tribe could be delegated jurisdiction over Indians who are not members of the Rocky Boy's Tribe but members of other recognized Indian tribes. The tribe's constitution did not at the time of the opinion provide for such jurisdiction and Solicitor Margold noted that "a gap in law enforcement has been created." 1 Op. Sol. 859. The position was reiterated in an opinion of February 17, 1939 in 1 Op. Sol. 872, involving the same reservation. On December 3, 1940, the solicitor, issued his opinion of the authority of the Navajo Tribe to ban use of peyote within the reservation. While the solicitor found that the ordinance had not been approved and adopted as a part of the law and order regulations for the Navajo Reservation and was therefore not in effect, he noted with particularity: "Several of the Indians are said to be non-members of the tribe. If the ordinance had been in effect, it would have embraced them under the definition of court jurisdiction in the law and order code." 1 Op. Sol. 1009.

In 1883, the Department of the Interior issued regulations calling for the establishment on each reservation of a "Court of Indian Offenses." The court, where it has

continued to exist, is substantially as established, except for the definition of particular offenses.[21] The regulations distinguish between civil and criminal jurisdiction so that 25 CFR 11.2(a) provides that the court shall have jurisdiction of *criminal offenses* "when committed by *any Indian* within the reservation or reservations for which the court is established" (Emphasis supplied).[22] 25 CFR 11.22 provides that the court "shall have jurisdiction of all [civil] suits wherein the *defendant* is a *member* of the tribe or tribes within their jurisdiction," (Emphasis supplied). While the Department of the Interior has taken special care in regard to Courts of Indian Offenses to limit the courts' civil jurisdiction to members of the tribe it extended its criminal jurisdiction to any Indian committing an offense within the reservation. The Department of the Interior, like the Congress, has applied some regulations to certain Indians and other regulations to all Indians.[23]

Felix Cohen's review of federal Indian law supports the respondent's position.[24] In tracing tribal criminal jurisdiction he noted:

> So long as the complete and independent sovereignty of an Indian tribe was recognized, its criminal juristiction, no less than its civil jurisdiction, was that of any sovereign power. It might punish its subjects for offenses against each other or against aliens and for public offenses against the peace and dignity of the tribe. *Similarly, it might punish aliens within its jurisdiction according to its own laws and customs. Such jurisdiction con-*

21 For the court's history, *see* Op. Sol. Dept. Int., Feb. 28, 1935; 1 Op. Sol. 531, 533. *See also* Hagan, *Indian Police and Judges* at 104 (1966).

22 The case that upheld the power of the Department of the Interior to create the court and the offenses it was to try, noted that Rule 9 of the original rules for the court of Indian offenses provided that the court shall have "jurisdiction of misdemeanors committed by Indians belonging to the reservation". *United States* v. *Clapox,* 35 Fed. 573, 576 (D.C. Ore. 1888).

23 See Appendix B

24 Cohen, *Handbook of Federal Indian Law* (1942) at 146.

> *tinues to this day, save as it has been expressly limited by the acts of a superior government.* (Emphasis supplied)[25]

After reviewing the Major Crimes Act, Cohen asserts: "All offenses other than those remain subject to tribal law and custom and to tribal courts."[26] Cohen noted that "the original tribal jurisdiction extends over visiting Indians"[27] and compares this continuing jurisdiction with the claim of jurisdiction over non-Indians which he relates "has been generally condemned by the federal courts."[28]

Cohen concluded his review of tribal criminal jurisdiction in these words: "There is nothing to justify an alternative to the conclusion that the Indian tribes retain sovereignty and jurisdiction over a vast area of ordinary offenses over which the Federal Government has never presumed to legislate and over which the state governments have not the authority to legislate."[29]

Before American sovereignty was established over the Indian tribes, tribes has established governments. Under the impetus of the Indian Reorganization Act of 1934 constitutions were adopted by tribes establishing court systems similar to those in American counties. Who was subject to those court systems depended on the jurisdictional assertions of the tribe, restricted only by the lack of criminal jurisdiction over non-Indians and specific federal enactments. As we have seen, a tribe whose constitution and code allowed for criminal jurisdiction over Indians who were members of other federally recognized tribes was

25 *Id.* at 146.

26 *Id.* at 147.

27 *Id.* at 148.

28 *Id.*

29 *Id.*

accorded that jurisdiction by approval of its constitution and code by the Secretary of the Interior.

The relief sought by the petitioner is nothing less than the reversal of a pattern of juridical behavior which antedates American sovereignty and which has been sanctioned and fully recognized by the Executive and the Congress, as well as this Court.[30] The inherent criminal jurisdiction of Indian tribes over non-member Indians who are members of federally recognized Indian tribes has existed into modern times. It was not lost as being inconsistent with tribal dependent status. Congressional action has buttressed rather than restricted the tribes' inherent jurisdiction over such non-member Indians. Upsetting the settled pattern of criminal jurisdiction would result in a jurisdictional void of benefit only to petty criminals.[31]

30 This Court has observed that "[T]he commonly shared presumption of Congress, the Executive Branch and lower federal courts that tribal courts do not have the power to try non-Indians carries considerable weight." *Oliphant*, 435 U.S. at 206. As has been shown, the presumption, as to non-member Indians, of Congress and the Executive is that Indian tribal courts *do* have criminal jurisdiction over non-member Indians.

31 Both the Hebrew and Greek cultures dealt with the right of the polity to impose its law on those who reside within the jurisdiction of the polity.

> And when a stranger who resides with you would offer a passover sacrifice to the Lord, he must offer it in accordance with the rules and rites of the passover sacrifice. *There shall be one law for you, whether stranger or citizen of the country.* (Emphasis supplied)

Numbers 9.14

As the Lord spoke to Moses so the Laws spoke to (or through) Socrates.

> For, having brought you into the world, and nurtured and educated you, and given you and every other citizen a share in every good which we had to give, we further proclaim to any Athenian by the liberty which we allow him, that if he does not like us when he has become of age and has seen the way of the city, and made our acquaintance, he may go where he pleases and take his goods with him. None of us laws will forbid him or interfere with him. Any one who does not like us and the city, may go where he likes, retaining his property. *But he who has experience of the manner in which we order justice and administer the state, and still remains has entered into an implied contract that he will do as we command him.* (Emphasis supplied)

Plato, *Crito* *51

IV. IF THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY COURT DOES NOT HAVE THE JURISDICTION TO TRY AND TO PUNISH ALBERT DURO FOR THE OFFENSE CHARGED, ALBERT DURO WILL NEVER BE TRIED AND PUNISHED FOR THAT OFFENSE.

Albert Duro, a member of a federally recognized Indian tribe and a resident and employee of the Salt River Pima-Maricopa Indian Community with personal, if not familial, ties to the Commnity, was charged with a crime by the Community for which he could not have been tried or punished in federal or state courts. The misdemeanor with which he was charged is not cognizable under the Major Crimes Act. Since the crime he is accused of committing resulted in the death of a fourteen year old Indian youth, a member of the Gila River Indian Community, the Assimilative Crimes Act and the Indian Country Crimes Act do not apply. Those three statutes do not differentiate between Indian people of different tribes.[32]

32 So that in *Kagama,* this Court, in reviewing the constitutionality of the Major Crimes Act, noted:

> The distinction is claimed to be that the offense under the statute is committed by an Indian, that it is committed on a reservation set apart within the state for residence of the tribe of Indians by the United States, and *the fair inference is that the offending Indian shall belong to that or some other tribe*... Its effect is confined *to the acts of an Indian of some tribe,* of a criminal character, committed within the limits of the reservation. (Emphasis supplied)

Kagama, 119 U.S. at 383.

See also United States v. *Burland,* 441 P.2d 1199 (9th Cir. 1971) in which the court held that a Salish and Kootenai tribal member living on the Flathead Reservation who committed a Major Crimes Act crime on the Fort Peck Reservation (of which he was not a member) could be tried in federal court; courts have gone further than we suggest by according Indian status without formal membership in any tribe based on significant involvement in a tribal community. *United States* v. *Ives,* 504 F.2d 935 (9th Cir. 1978), a Major Crimes Act case, in which the court held: "Enrollment or lack of enrollment is not determinative of Ives' status as an Indian." *Id.* at 953; and *Ex Parte Pero,* 60 F.2d 28 (7th Cir. 1938) in which the court held: "The lack of enrollment in the case of *Moore* is not determinative of status" *Id.* at 31.

Certainly, the definition of "Indian" in the Major Crimes Act is no different from what it is in the Indian against Indian exception language of the Assimilative Crimes Act or the Indian Country Crimes Act. Albert Duro would pass through the federal criminal jurisdiction net. He would not be entangled in the state criminal jurisdictional net since absent tribal consent under 25 U.S.C. § 1321(a) and state action under 25 U.S.C. § 1324, or specific congressional enactment Arizona does not have criminal jurisdiction over him.

Those courts which have dealt with the question have uniformly determined that states do *not* have jurisdiction over crimes committed by Indians who are not members of the reservation on which the crime was committed.[33]

33 In *Cook* v. *State,* 215 N.W. 2d 832 (1974) the Supreme Court of South Dakota held that it was error for a lower court to deny post conviction relief to an Indian who was not a member of the Oglala Sioux Tribe to question the State of South Dakota's jurisdiction over him for a crime which he committed on the Pine Ridge Indian Reservation; In *State of Arizona ex rel Merrill* v. *Turtle,* 413 F.2d 683, 685, (9th Cir. 1969) the Court heard an appeal from the issuance of a writ of habeas corpus by a Cheyenne Indian who resided with his Navajo Indian wife on the Navajo Reservation and who was arrested on a warrant of the Governor of Arizona issued on the extradition demand of the Governor of Oklahoma. The question before the court was whether "Arizona's claim to extradition jurisdiction over Indian residents of the Navajo Reservation is subject to the tests of non-interference with the right of tribal self-government laid down in *Williams*..." to which question the Court concluded that "Arizona's exercise of the claimed jurisdiction would clearly interfere with rights essential to Navajo's self-government."; and in *State* v. *Allen, supra,* where the Supreme Court of Idaho determined that notwithstanding the fact that the defendant was an enrolled member of the Quinault Tribe of Indians who resided on the Coeur d'Alene Indian Reservation, the mere residence on a reservation not of his tribe, does not emancipate him for purposes of jurisdiction and he "is not subject to state prosecution." *Allan* 607 P.2d at 429; the only state court that has determined that a non-member Indian living on an Indian reservation not his own was subject to state jurisdiction was the New York Court in *People ex rel Schuyler* v. *Livingstone,* 123 Misc. 605, 205 N.Y.S. 888 (Sup. Ct. 1924) in which the court relied on language from an earlier New York case; "It seems to me reasonably clear... that...that Onondagaes [are]...a nation dependent upon and owing allegiance to the State of New York, occupying lands over which the state has the right of preemption." *George* v. *Pierce,* 85 Misc. 105, 148 N.Y.S. 230, 235 (1914) which points out the significant difference that makes the New York case inapposite here. New York had criminal jurisdiction over reservation Indians from early times. 25 U.S.C. § 232 enacted July 2, 1948. 62 Stat. 1224 confirmed the jurisdiction of the state. Comment, *The New York Indians' Right to Self-Determination,* 22 Buffalo L. Rev. 985, 992 (1973).

This court, in *John,* recognized the Indian Reorganization Act's definition of "Indians": "The 1934 Act defined 'Indians' not only as 'all persons of Indians descent who are members of any recognized [in 1934] tribe now under federal jurisdiction,' and their descendants who then were residing on any Indian reservation, but also as 'all other persons of one-half or more Indian blood.'" *John,* 437 U.S. at 650.

Albert Duro is an Indian and his conduct resulted in the death of a fourteen year old Indian youth. He cannot be tried either in state or federal court for the offense charged in the Salt River Community Court. If he cannot be tried and punished by the Salt River Community Court, then he cannot be tried and punished. And Albert Duro does not stand alone as an Indian who lived and worked on a reservation not his own. Historically and in modern times Indian people have lived on reservations of their spouses when their spouses were of a different tribal polity. Interrelations between Indians of various tribal polities spring from the nature of federal involvement with Indian life at the time of occupation of the west by the United States. The creation of Indian reservations by the United States divided previously united Indian tribes.[34]

34 The Salt River Pima-Maricopa Indian Community Reservation was created by Executive Order of January 10 1879, which was later modified by Executive Order of June 14, 1879, and those Executive Orders provided that the land described be "set apart for the use of said *Pima and Maricopa Indians,...*" On August 31, 1876, an Executive Order set aside certain land "as an addition to the Gila River Reservation in Arizona for the use and occupancy of the *Pima and Maricopa Indians.*" The Pimas and Maricopas were two separate tribes who lived together after the Maricopas migrated to Pima territory from the Colorado River. They maintained separate cultures and languages. Spier, op. cit., at X. Not only were Pimas and Maricopas divided between federally established reservations, other Indian tribes were subject to the same federal policy. In southern California, the aboriginal lands belonged to groups of people who came to be known as "Mission Indians". These tribes included the *Cahuilla,* Serrano, Luiseno, Diegueno and Kumeyaay. These five tribes were placed on thirty-three separate rancheros or reservations. "Mr. Duro is a Cahuilla Indian and a living remnant of a distinct ethnic and cultural group..." (Pet. Brief at 2) The Cahuillas were placed on ten reservations. One of them was the Torres-Martinez Reservation established in 1876 on over twenty-five thousand acres. Shipek, *History of Southern California Mission Indians,* in W. Sturvenvant Ed., *Handbook of North American Indians,* Vol. 8, "California", 612, 613 (1978).

V. THE EQUAL PROTECTION RIGHTS OF ALBERT DURO WERE NOT VIOLATED

It is settled constitutional doctrine that the Congress may enact laws which accord different treatment to Indians than to non-Indians and which do not constitute invidious racial discriminations. Such laws may benefit individual Indians as in *Morton* v. *Mancari,* 417 U.S. 535 (1974), where a claim was made by certain non-Indian employees of the Bureau of Indian Affairs that employment preference for Indians violated certain anti-discrimination provisions of the Equal Employment Opportunites Act of 1972 and deprived the claimants of property rights without due process of law in violation of the Fifth Amendment. Denying the claim this Court noted: "[P]reference does not constitute 'racial discrimination'. Indeed, it is not even a 'racial' preference. Rather, it is an employment criteria reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups." Morton 417 U.S. at 553, 554. Such laws may work to the detriment of individual Indians yet benefit Indian tribes and advance federal Indian policy by providing for a system of criminal jurisdiction which promotes law and order on Indian reservations. Thus, in *Antelope,* this Court denied a challenge that the Major Crimes Act as applied resulted in improper racial discrimination because had a non-Indian been charged with the same offense and subject to prosecution under Idaho law, the quantum of proof to sustain the charge would have been greater than that required under federal law. The Court held that there was no violation of the Due Process Clause and noted that: "[F]ederal regulation of Indian affairs is not based upon impermissible classifications... respondents were not subject to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d'Alene Tribe." *Antelope,* 430 U.S. at 646.

Fisher v. *District Court,* 424 U.S. 382 (1976) is, in principle, indistinguishable from *Duro.* In *Fisher:*

> [T]he tribe adopted a constitution and by-laws pursuant to Section 16 of the Indian Reorganization Act,...a statute specifically intended to encourage Indian tribes to revitalize their self government...Acting pursuant to the constitution and by-laws, the tribal council of the Northern Cheyenne Tribe established the tribal court and granted it jurisdiction over adoptions 'among members of the Northern Cheyenne Tribe'.
>
> *Fisher,* 424 U.S. at 387.[35]

The community adopted a constitution and by-laws pursuant to Section 16 of the Indian Reorganization Act and acting pursuant to the constitution and by-laws, the Community Council established the Community Court and granted it criminal jurisdiction over offenders against community law. All of these actions were approved by the Secretary of the Interior.

This Court viewed the exercise of self government by the tribe in *Fisher* as an exercise of power granted under the Indian Reorganization Act of 1934. So that the inherent jurisdiction to try and to punish non-member Indians is subject to the procedures authorized to be adopted by the tribal constitution and approved as tribal ordinance by the Secretary of the Interior as well as specific federal enactments such as the Indian Civil Rights Act of 1968.

In *Santa Clara Pueblo* v. *Martinez,* 436, U.S. 49 (1978), a case which dealt with a difference in treating membership rights based upon gender, the court found "respondents [at least one of whom was a nonmember child of the mother respondent], American Indians living on the Santa Clara reservation, are among the class for whose especial

35 "The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law." *Id.* at 390

benefit [the Indian Civil Rights Act of 1968] was enacted." *Martinez,* 436 U.S. at 61, 74. the rights enumerated in the Act can be vindicated only by habeas corpus so that the "especial benefit" for "American Indians living on the... reservation" must be such as will protect them from incarceration resulting from criminal prosecutions in which the rights created by the Act are violated. The failure of a tribal court to allow a criminal defendant counsel of his choice, or deprivation of trial by jury are examples of such rights which are particularly set out. It is clear from *Martinez* that Congress determined to give such benefits to Indians without distinction for their protection. Such a Congressional determination is unassailable, fitting well within the power of Congress under the Indian Commerce Clause to make laws to especially deal with Indians.

The argument of petitioner that this case is burdened by racial discrimination is specious.[36] The assertion of jurisdiction is based solely on Indian status, not on race. No assertion of jurisdiction is made over an ethnic Indian who is not a member of a federally recognized Indian tribe. Under the Stipulation of Fact Albert Duro is a Cahulli Indian. He is an enrolled member of the Torrez-Martinez Band of Mission Indians, a federally recognized band of American Indians. (Joint App. at 60, No. 2) No question of race or ethnicity is before this Court. No blood quantum is asserted and that is for the simple reason that jurisdiction is claimed solely by virtue of petitioner's membership in an Indian tribe.[37] Jurisdiction is being asserted over petitioner for reasons other than race.

The long discussion of alleged violations of civil rights in the tragic Navajo-Hopi land dispute[38] is both beyond

36 Pet. Brief at 44.

37 Unlike membership in a race or an age group, one may resign from an Indian tribe. *United States ex rel. Standing Bear* v. *Crook,* 25 F. Cas. 695 (No. 14,891) C.C. Neb. 1879); *See Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393, 404 (1856).

38 Pet. Brief at 49, 50.

the record and irrelevant. Lee Phillips' complaint should have been addressed to the district court under 25 U.S. 1302 to test the fairness of Hopi criminal court proceedings and selection of jurors. Instead a political argument is made. There is nothing in the record of this case that indicates any unfairness, any violation of petitioner's rights under the Indian Civil Rights Act of 1968. It is scandalous to assume that an Indian court would be any more likely to be biased against non-members than a state court would be against citizens of another state. There is a remedy under 25 U.S.C. § 1302 for violation of rights in a criminal proceeding as there are remedies for state court rights violation. "Potential discrimination" is remedied at the point of actual violation.

CONCLUSION

Albert Duro came to the Salt River Pima-Maricopa Indian Community's reservation, worked in a company owned by the Community and lived in a house owned by a member of the Community with a woman who was herself a member of the Community. He offended the laws of the Community and pled guilty in the Court of the Community. He was thereafter accused of discharging a firearm and thereby killing a young boy, a member of the Gila River Indian Community, who was a resident of the Community.

No government can exist, no community can survive, in the face of random violence, petty thievery and outrageous behavior. The laws of the Salt River Pima-Maricopa Indian Community were enacted to prevent and punish such activity. In this, the Community is no different than any other government. Its first obligation is to provide for the public safety and to promote domestic tranquility.

To the extent that the Community must rely on law enforcement from other governmental bodies, to that extent it is unable to assure the people of the Community the tranquility and order that every government must provide. The inability to provide for law and order strikes at the very heart of self government. The Community ought not to be a beggar for police protection and judicial services. It is now and ought to be the provider of such services.

Albert Duro ought not to be allowed to take advantage of the benefits which the Community offers and yet be able to disassociate himself from the obligations which living in a civilized society imposes on all.

The judgment below ought to be affirmed.

Respectfully submitted,

Richard B. Wilks
M.J. Mirkin
SHEA & WILKS
114 W. Adams, Suite 200
Phoenix, Arizona 85003
(602) 257-1126
Attorneys for Respondents

APPENDIX A

STATUTORY REFERENCES TO VARIOUS CATEGORIES OF INDIANS*

7 U.S.C. § 1985 (agricultural credit)
(e) (1) (D) (iii) (I):
"*an Indian member of the Indian tribe* that has jurisdiction over the reservation within which the real property is located;"

18 U.S.C. § 437 (trading with Indians)
(a) (1), (2):
"*any Indian*..."
(b) (2) (A), (B):
"*any Indian*..."
(c):
"*any member* of his or her *particular tribe*..."

18 U.S.C. § 1152 (offenses in Indian Country)
"offenses committed by *one Indian* against the person or property of *another Indian*..."

18 U.S.C. § 1153 (offenses in Indian Country)
"*any Indian* who commits against the person or property of *another Indian* or other person..."

25 U.S.C. § 181 (protection of Indians)
"No *white man, not otherwise a member of any tribe of Indians* who may...marry an Indian woman, *member of any Indian tribe*..."

25 U.S.C. § 375d. (descent and distribution)
"a *member* of the Cherokee, Chickawa, Choctaw or Seminole Nations or Tribes of Oklahoma *or a person of the blood of said tribe*..."

25 U.S.C. § 450b. (self-determination)
(a):
"'Indian' means a person who is a *member of an Indian tribe;*"

25 U.S.C. § 464 (transfer of restricted lands)

"any *member of such tribe...or any heirs* or lineal descendants of such member *or any other Indian person...*"

25 U.S.C. § 476 (tribal organization)

"*adult members* of the tribe, *or* of the *adult Indians* residing on such reservation..."

25 U.S.C. § 640a. (Navajo/Hopi rehabilitation)

"*members of the tribe* and other qualified applicants..."

25 U.S.C. § 677a. (distribution of Ute assets)

(b):

"'Full-blood' means a *member* of the tribe who..."

(c):

"'Mixed-blood' means a *member* of the tribe who..."

25 U.S.C. § 1481 (loan guaranties)

"*individual Indians...*"

25 U.S.C. § 1603 (health care)

(a):

"'Indians' and 'Indian', unless otherwise designated, means any person who is a *member of an Indian tribe* ...except that [for certain purposes] such terms shall mean *any individual who* (1), irrespective of whether he or she lives on or near a reservation, *is a member* of a tribe, ban, or other organized group *of* Indians, including those *tribes,* bands or groups *terminated* since 1940...(2) *is considered* by the Secretary of the Interior *to be an Indian* for any purpose; or (3) *is determined to be an Indian* under regulation promulgated by the Secretary."

25 U.S.C. § 1814 (community college grants)

(b) (1):

"The Secretary shall not provide any funds to any

institution which denies admission to *any Indian* student because such individual is *not a member of a specific Indian tribe,* or which denies admission to *any Indian* student because such individual *is a member of a specific tribe.*"

25 U.S.C. § 1915 (child welfare)

(a):

"a preference shall be given...to a placement with (a) a member of the child's extended family; (2) other *members of* the Indian child's *tribe;* or (3) *other Indian families.*"

25 U.S.C. § 2205 (land consolidation)

(a):

"*nonmembers* of the tribe *or non-Indians...*"

(a) (1):

"*non-Indian* or *nonmember spouse...*"

(a) (2):

"*non-Indian* or *nonmember spouse...*"

(a) (3):

"*non-Indian* or *nonmember spouse...*"

42 U.S.C. § 2991(b) (health & welfare)

(a):

"*Indians* who are *not members* of a federally recognized tribe."

42 U.S.C. § 5919 (energy research)

(v):

"*members* of the *affected Indian tribes...*"

* All emphases supplied

APPENDIX B

DEPARTMENT OF THE INTERIOR REFERENCES TO VARIOUS CATEGORIES OF INDIANS*

25 CFR § 5.1 (employment preferences)
(a):
"*Members of any recognized tribe* now under Federal Jurisdiction;"

25 CFR § 11.2 (Court of Indian Offenses criminal jurisdiction)
(a):
"any Indian..."
(c):
"an Indian shall be deemed to be any person of Indian descent who is a *member of any recognized Indian tribe* now under Federal Jurisdiction..."

25 CFR § 11.3 (judges of Court of Indian Offenses)
(d):
"a person shall be eligible to serve as judge...only if he (1) is a *member of a tribe* under the jurisdiction of the said court;"

25 CFR § 11.18 (bail or bond)
"Bail shall be by two reliable *members of any Indian tribe*..."

25 CFR § 11.22 (Court of Indian Offenses civil jurisdiction)
"jurisdiction of all suits wherein the defendant is a *member of the tribe or tribes* within their jurisdiction..."

25 CFR § 11.22C (Court of Indian Offenses civil jurisdiction)
"jurisdiction of all suits wherein the parties...are *members*...and of all other suits between *members and non-members* which are brought before the courts by stipulation of both parties."

25 CFR § 11.74 (misdemeanors)
"*any Indian* who violates an ordinance..."

25 CFR § 41.11 (assistance for higher education)
(a):
admission to any such community college shall not be denied to *any Indian* student because such individual is *not a member of a specific Indian tribe or* because such individual *is a member of a specific Indian tribe.*"

25 CFR § 101.20 (loans to Indians)
(c):
"In order for individuals to be eligible for loans from tribal funds, they must be *members of the tribe to which the funds belong.*"

25 CFR § 103.8 (loan guaranties)
"Indians who are *members of tribes...which are not making loans to its members*...are eligible for guaranteed or insured loans."

25 CFR § 104.5 (contracting with Indians)
(a) (1):
"'Indian' means *any member of an Indian tribe... who* is residing on a Federal Indian reservation on land held in trust...or [on restricted land]."

25 CFR § 140.16 (contracting with Indians)
"Livestock or their increase purchased by the Government and in possession or control of the Indians may not be purchased by any trader, not a *member of the tribe*..."

25 CFR § 141.2 (business on certain reservations)
"The regulations of this part apply to all *non-members...who engage in retail business* on the above respective reservations."

25 CFR § 151.2 (land acquisitions)
(c):
"'Individual Indian' means:
(1) any person who is an *enrolled member of a tribe*'
(2) any person who is a *descendant of such a member...;*
(3) *any other person possessing* a total of one-half or more degree *Indian blood* of a tribe;"

25 CFR § 162.5 (leasing of land)
(b) (2):
"tribal land may be lease at a nominal rental...for homesite purposes to *tribal members...*"

25 CFR § (Navajo grazing)
(b):
an objective of the regulations is to protect "the interests of the Navajo Indians from the encroachment of unduly aggressive and anti-social *individuals who may or may not be members* of the Navajo tribe."

25 CFR § 244.11 (hunting on a certain reservation)
"There shall be no hunting by persons other than *enrolled members* of the Shoreshone (sic.) and Arapahoe Tribes...on any Indian land of the Reservation. *Non-member spouses of tribal members* are not allowed to hunt."

25 CFR § 256.2 (housing improvements)
(e):
"Indian' means a person of Indian descent who is either of the following:
(1) *an enrolled member...*of a tribe; or
(2) *a person who is considered to be a member...;*
(3) *a person of one-half* or more degree Indian ancestry *who is a descendant of a member of a tribe* ...such persons are hereinafter referred to as *'nontribal Indians'*."

* All emphases supplied